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11
12 UNITED STATES DISTRICT COURT
13 DISTRICT OF NEVADA

14 SALEBUILD, INC., d/b/a SALESIFY;
15 SALEBUILD IT ENABLED SERVICES
PVT. LTD.,

16 Plaintiffs,

17 v.

18 FLEXISALES, INC.,

19 Defendant.

Case No. 2:12-cv-1403-JAD-GWF

**STIPULATED PROTECTIVE ORDER
FOR THE TREATMENT OF
CONFIDENTIAL INFORMATION**

1 To expedite the production of discovery material, to facilitate the prompt resolution of
2 disputes over confidentiality of discovery material, to adequately protect information the parties
3 are entitled to keep confidential, to ensure that only the materials the parties are entitled to keep
4 confidential are subject to such treatment, and to ensure that the parties are permitted reasonably
5 necessary uses of confidential discovery material in preparation for and in the conduct of this
6 litigation, pursuant to Fed. R. Civ. P. 26(c), the parties stipulate to the following Protective Order:

7 **I. INFORMATION SUBJECT TO THIS ORDER**

8 **A. Protected Information Generally**

9 1. All documents, electronically stored information, tangible things, physical objects,
10 written discovery responses, testimony, or other information produced by the producing party in
11 this litigation is considered "Discovery Material." This Order applies not only to Discovery
12 Material produced in this litigation, but also to any information copied or extracted therefrom or
13 otherwise reflecting Protected Information, in any form. Any Discovery Material containing or
14 including confidential information may be designated as such by the producing party by marking
15 it "CONFIDENTIAL," "HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL ONLY" or
16 "RESTRICTED CONFIDENTIAL - SOURCE CODE", and shall be treated in accordance with
17 the terms of this Order. Each of the identified categories of confidential Discovery Material shall
18 be identified collectively in this Order as "Protected Information."

19 2. All Protected Information not reduced to documentary, electronic, tangible or
20 physical form, or which cannot be conveniently designated as set forth in paragraph I.A.1 or
21 pursuant to another confidentiality designation set forth in this Order, shall be designated by the
22 producing party by informing the receiving party of the designation in writing.

23 3. Any Discovery Material made available for inspection shall initially be considered,
24 as a whole, to constitute the highest designation of Protected Information (unless otherwise
25 designated at the time of inspection) and shall be subject to this Order. Thereafter, the producing
26 party shall have a reasonable time to review and designate the Discovery Material in accordance
27 with this Order.

28 4. Any Protected Information that is obtained by any party from any person pursuant

1 to discovery in this litigation shall be used solely for purposes of this litigation.

2 5. Nothing in this Order shall limit any producing party's use or disclosure of its own
3 Protected Information.

4 6. The following Discovery Material is not Protected Information:

5 a. Any Discovery Material that is or, after its disclosure to a receiving party,
6 becomes part of the public domain as a result of publication not involving a violation of
7 this Order or other obligation to maintain the confidentiality of such material;

8 b. Any Discovery Material that the receiving party can show was already
9 publicly known prior to the disclosure; and,

10 c. Any Discovery Material that the receiving party can show by written
11 records was received by it from an alternate source that obtained the material lawfully and
12 under no obligation of confidentiality to the producing party.

13 **B. Protected Information Designated CONFIDENTIAL**

14 1. For purposes of this Order, Protected Information designated CONFIDENTIAL
15 shall mean all Discovery Material produced for or disclosed in connection with this action to a
16 receiving party that a producing party considers to comprise confidential or commercially
17 sensitive technical, sales, marketing, personal, or financial information of the producing party
18 (including any party to this action and any non-party producing information or material
19 voluntarily or pursuant to a subpoena or a court order in connection with this action), or
20 information that the producing party is under a legal obligation to maintain as confidential.

21 2. Protected Information designated CONFIDENTIAL and the contents therein shall
22 be available only to:

23 a. Outside litigation counsel of record and supporting personnel employed in
24 the law firm(s) of outside litigation counsel of record, such as attorneys, paralegals, legal
25 translators, legal secretaries, law clerks, project managers and litigation support personnel,
26 to whom it is reasonably necessary to disclose the information;

27 b. Up to two in-house counsel of any party with responsibility for managing
28 this litigation, who are members of at least one state bar in good standing, and who have

1 first been given a copy of this Order;

2 c. Technical Advisors and their necessary support personnel engaged by
3 counsel of record for the parties, subject to the provisions of section V herein, and
4 provided that such individuals have first been given a copy of this Order and have
5 executed the Confidentiality Agreement attached hereto as Attachment A. The term
6 “Technical Advisor” shall mean independent outside technical expert witnesses,
7 consulting experts, or technical consultants (none of whom are employees) retained by
8 counsel of record for the parties, who are deemed reasonably necessary to assist such
9 counsel in connection with this litigation;

10 d. Independent contractors engaged by counsel of record for the parties, to the
11 extent reasonably necessary to assist counsel in connection with this litigation, provided
12 that such persons or entities have first been given a copy of this Order and either have
13 executed the Confidentiality Agreement attached hereto as Attachment A and a signed
14 copy has been provided to the producing party or are contractually bound to adhere to the
15 terms of this Order, including but not limited to: (i) legal translators retained to translate
16 in connection with this action; (ii) independent stenographic reporters and videographers
17 retained to record and transcribe testimony in connection with this action; (iii) graphics or
18 design service providers retained to prepare demonstrative or other exhibits for deposition,
19 trial, or other court proceedings in the litigation; (iv) non-technical jury or trial consulting
20 service providers, not including mock jurors; (v) electronic discovery vendors retained to
21 assist with the organization and management of electronic discovery; and (vi) private
22 investigators; and

23 e. The Court, its personnel, and any other person (such as a master or
24 mediator) who serves in a judicial or quasi-judicial function, professional stenographic
25 reporters engaged to transcribe testimony (under seal or with other suitable precautions
26 determined by the Court), and jurors.

C. Protected Information Designated HIGHLY CONFIDENTIAL - OUTSIDE COUNSEL ONLY

1. For purposes of this Order, Protected Information designated HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL ONLY shall mean Protected Information that contains extremely sensitive information. Protected Information designated HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL ONLY includes, but is not limited to: (i) marketing, financial, sales, web traffic, research and development, or technical, data or information; (ii) commercially sensitive competitive information, including, without limitation, information obtained from a nonparty pursuant to a current Nondisclosure Agreement (“NDA”); (iii) information or data relating to future products not yet commercially released and/or strategic plans; (iv) trade secret, or other confidential research and development information; and, (v) commercial agreements, settlement agreements or settlement communications, the disclosure of which is likely to cause harm to the competitive position of the producing party.

2. Protected Information designated HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL ONLY and the contents therein shall be available only to:

a. Outside litigation counsel of record and supporting personnel employed in the law firm(s) of outside litigation counsel of record, such as attorneys, paralegals, legal translators, legal secretaries, law clerks, project managers and litigation support personnel, to whom it is reasonably necessary to disclose the information;

b. Technical Advisors and their necessary support personnel engaged by counsel of record for the parties, subject to the provisions of section IV herein, and provided that such individuals have first been given a copy of this Order and have executed the Confidentiality Agreement attached hereto as Attachment A; and

c. The Court, its personnel, and any other person (such as a master or mediator) who serves in a judicial or quasi-judicial function, professional stenographic reporters engaged to transcribe testimony (under seal or with other suitable precautions determined by the Court), and jurors.

3. In determining whether Protected Information should be designated as HIGHLY

1 CONFIDENTIAL – OUTSIDE COUNSEL ONLY, each party agrees to use such designation
2 only in good faith.

3 **D. Protected Information Designated RESTRICTED CONFIDENTIAL -**
4 **SOURCE CODE**

5 1. The RESTRICTED CONFIDENTIAL - SOURCE CODE designation is reserved
6 for Protected Information that contains or substantively relates to a producing party's "Source
7 Code," which shall mean documents containing or substantively relating to confidential,
8 proprietary and/or trade secret source code or technical design documentation. The following
9 conditions shall govern the production, review and use of source code or design documentation
10 information.

11 2. All such Source Code, and any other Protected Information designated as
12 RESTRICTED CONFIDENTIAL —SOURCE CODE, shall be subject to the following
13 provisions:

14 a. Source Code, to the extent any producing party agrees to provide any such
15 information, shall ONLY be made available for inspection, shall not be produced except
16 as provided for below, and shall be made available in electronic format at one of the
17 following locations chosen at the sole discretion of the producing party: (1) the offices of
18 the producing party's primary outside counsel of record in this action; (2) the offices of
19 the producing party; (3) a single, third-party site located within any judicial district in
20 which the Source Code is stored in the ordinary course of business (e.g., an escrow
21 company); or (4) a location mutually agreed upon by the receiving and producing parties.
22 Any location under (1), (2), (3) or (4) above shall be in the continental United States.
23 Source Code will be loaded on a single, non-networked computer that has disk encryption
24 and is password protected and maintained in a secure, locked area. Use or possession of
25 any input/output device (e.g., USB memory stick, mobile phone or tablet, camera or any
26 camera-enabled device, CD, floppy disk, portable hard drive, laptop, or any device that
27 can access the Internet or any other network or external system, etc.) is prohibited while
28 accessing the computer containing the Source Code. All persons entering the locked room

1 containing the Source Code must agree to submit to reasonable security measures to
2 ensure they are not carrying any prohibited items before they will be given access to the
3 locked room. The computer containing Source Code will be made available for inspection
4 during regular business hours, upon reasonable notice to the producing party, which shall
5 not be less than 3 business days in advance of the requested inspection.

6 b. The receiving party's outside counsel and/or Technical Advisors may
7 request that commercially available licensed software tools for viewing and searching
8 Source Code be installed on the secured computer. The receiving party must provide the
9 producing party with the CD or DVD containing such software tool(s) at least four
10 business days in advance of the inspection.

11 c. The receiving party's outside counsel and/or Technical Advisors shall be
12 entitled to take notes relating to the Source Code, but may not copy any portion of the
13 Source Code into the notes. No copies of all or any portion of the Source Code may leave
14 the room in which the Source Code is inspected except as otherwise provided herein.
15 Further, no other written or electronic record of the Source Code is permitted except as
16 otherwise provided herein.

17 d. No person shall copy, e-mail, transmit, upload, download, print,
18 photograph or otherwise duplicate any portion of the designated Source Code, except that
19 the receiving party may request a reasonable number of pages of Source Code to be
20 printed by the producing party, but only if and to the extent necessary for use in this
21 action. In no event may the receiving party print more than 25 consecutive pages, or an
22 aggregate total of more than 500 pages, of Source Code during the duration of the case
23 without prior written approval by the producing party. Within 5 business days or such
24 additional time as necessary due to volume requested, the producing party will provide the
25 requested material on watermarked or colored paper bearing Bates numbers and the
26 legend "RESTRICTED CONFIDENTIAL - SOURCE CODE" unless objected to as
27 discussed below. The printed pages shall constitute part of the Source Code produced by
28 the producing party in this action. At the receiving party's request, up to two additional

1 sets (or subsets) of printed Source Code may be requested and provided by the producing
2 party in a timely fashion.

3 e. If the producing party objects that the printed portions are not reasonably
4 necessary to any case preparation activity, the producing party shall make such objection
5 known to the receiving party within five business days. If after meeting and conferring
6 the producing party and the receiving party cannot resolve the objection (where such
7 meet-and-confer need not take place in person), the producing party shall be entitled, but
8 not required, to seek a Court resolution of whether the printed Source Code in question is
9 reasonably necessary to any case preparation activity. Contested Source Code print-outs
10 need not be produced to the requesting party until the matter is resolved by the Court.

11 f. Any printed pages of Source Code, and any other documents or things
12 reflecting Source Code that have been designated by the producing party as
13 RESTRICTED CONFIDENTIAL - SOURCE CODE may not be copied, digitally imaged
14 or otherwise duplicated, except in limited excerpts necessary to attach as exhibits to
15 depositions, expert reports, or court filings as discussed below.

16 g. Any paper copies designated RESTRICTED CONFIDENTIAL - SOURCE
17 CODE shall be stored or viewed only at: (i) the offices of outside counsel for the
18 receiving party, (ii) the offices of outside Technical Advisors who have been approved to
19 access Source Code; (iii) the site where any deposition is taken; (iv) the Court; or (v) any
20 intermediate location necessary to transport the information to a hearing, trial or
21 deposition. Any such paper copies shall be maintained at all times in a secure location
22 under the direct control of counsel responsible for maintaining the security and
23 confidentiality of the designated materials.

24 h. A list of names of persons who will view the Source Code will be provided
25 to the producing party in conjunction with any written (including email) notice requesting
26 inspection. The receiving party shall maintain a daily log of the names of persons who
27 enter the locked room to view the Source Code and when they enter and depart. The
28 producing party shall be entitled to have a person observe all entrances and exits from the

1 Source Code viewing room, and to a copy of the log.

2 i. Unless otherwise agreed to in advance by the parties in writing, following
3 each inspection, the receiving party's outside counsel and/or Technical Advisors shall
4 remove all notes, documents, and all other materials from the room that may contain work
5 product and/or attorney-client privileged information. The producing party shall not be
6 responsible for any items left in the room following each inspection session.

7 j. Only the following individuals shall have access to RESTRICTED
8 CONFIDENTIAL - SOURCE CODE materials, absent the express written consent of the
9 producing party or further court order:

10 1. Outside litigation counsel of record and supporting personnel
11 employed in the law firm(s) of outside litigation counsel of record, such as
12 attorneys, paralegals, legal translators, legal secretaries, law clerks, project
13 managers and litigation support personnel, to whom it is reasonably necessary to
14 disclose the information;

15 2. Up to three (3) Technical Advisors per party, in accordance with
16 section V;

17 3. The Court, its technical advisor (if one is appointed), its personnel,
18 and any other person (such as a master or mediator) who serves in a judicial or
19 quasi-judicial function, professional stenographic reporters engaged to transcribe
20 testimony (under seal or with other suitable precautions determined by the Court),
21 and jurors. Professional stenographic reporters shall not retain or be given copies
22 of any portions of the Source Code. If used during a deposition, the deposition
23 record will identify the exhibit by its production numbers;

24 4. While testifying at deposition or trial in this action only: (i)
25 any current officer, director or employee of the producing party or original source
26 of the information; (ii) any person designated by the producing party to provide
27 testimony pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure;
28 and/or (iii) any person who authored, previously received (other than in connection

1 with this litigation), or was directly involved in creating, modifying, or editing the
2 Source Code, as evident from its face or it is reasonably certain in view of other
3 testimony or evidence. Persons authorized to view Source Code pursuant to this
4 sub-paragraph shall not retain or be given copies of the Source Code except while
5 so testifying.

6 k. The receiving party's outside litigation counsel shall maintain a log of all
7 copies of the Source Code (received from a producing party) that are delivered by the
8 receiving party to any qualified person under paragraph j above. The log shall include the
9 names of the recipients and reviewers of copies and locations where the copies are stored.
10 Upon request by the producing party, the receiving party shall provide reasonable
11 assurances and/or descriptions of the security measures employed by the receiving party
12 and/or qualified person that receives a copy of any portion of the Source Code;

13 l. Except as provided in this paragraph, the receiving party may not create
14 electronic images, or any other images, of the Source Code from the paper copy for use on
15 a computer (e.g., may not scan the source code to a PDF, or photograph the code). The
16 receiving party may create an electronic copy or image of limited excerpts of Source Code
17 only to the extent necessary in a pleading, exhibit, expert report, discovery document,
18 deposition transcript, other Court document, or any drafts of these documents ("Source
19 Code Documents"). The receiving party shall only include such excerpts as are
20 reasonably necessary for the purposes for which such part of the Source Code is used.
21 Images or copies of Source Code shall not be included in correspondence between the
22 parties (references to production numbers shall be used instead) and shall be omitted from
23 pleadings and other papers except to the extent permitted herein. The receiving party may
24 create an electronic image as provided herein of a selected portion of the Source Code
25 only when the electronic file containing such image has been encrypted using
26 commercially reasonable encryption software including password protection. The
27 communication and/or disclosure of electronic files containing any portion of Source
28 Code shall at all times be limited to individuals who are authorized to see Source Code

1 under the provisions of this Protective Order. The receiving party shall maintain a log of
2 all electronic images and paper copies of Source Code in its possession or in the
3 possession of its Technical Advisors, including the names of the recipients and reviewers
4 of any electronic or paper copies and the locations where the copies are stored.
5 Additionally, all electronic copies must be labeled "RESTRICTED CONFIDENTIAL -
6 SOURCE CODE."

7 m. To the extent portions of Source Code are quoted in a Source Code
8 Document, either (1) the entire document will be stamped and treated as RESTRICTED
9 CONFIDENTIAL - SOURCE CODE or (2) those pages containing quoted Source Code
10 will be separately bound, and stamped and treated as RESTRICTED CONFIDENTIAL -
11 SOURCE CODE.

12 n. All copies of any portion of the Source Code in whatever form shall be
13 securely destroyed if they are no longer in use, and in all circumstances at the conclusion
14 of litigation as described in section X.C.

15 **II. USE OF PROTECTED INFORMATION AT HEARING OR TRIAL**

16 In the event that a party intends to use any Protected Information during any hearing or
17 trial, that party shall provide a minimum of two (2) business days' notice to the producing party.
18 Subject to challenges under section VI, the parties will not oppose any reasonable request by the
19 producing party that courtroom be sealed, if allowed by the Court, during the presentation of any
20 testimony, evidence, or argument relating to or involving the use of any Protected Information.

21 **III. PROSECUTION BAR**

22 A. Any person reviewing any party's Protected Information (all of which also shall be
23 automatically designated as "Prosecution Bar Materials") shall not, for a period commencing
24 upon receipt of such information and ending three years following the conclusion of this case
25 (including any appeals) engage in any Prosecution Activity (as defined below).

26 B. Prosecution Activity shall mean any activity related to competitive business
27 decisions involving: (i) the preparation or prosecution (for any person or entity) of patents or
28 patent applications relating to the technology at issue; or (ii) advising or counseling clients

1 regarding the same, including but not limited to, providing any advice or counseling regarding, or
2 participating in, the drafting or amending of claims for or in any patent, patent application, reissue
3 application, reexamination, inter partes review, post grant review, covered business method
4 review, or any other proceeding at the U.S. Patent and Trademark Office (or any similar agency
5 of a foreign government). Nothing in this paragraph shall prevent any attorney from sending non-
6 confidential prior art to an attorney involved in patent prosecution for purposes of ensuring that
7 such prior art is submitted to the U.S. Patent and Trademark Office (or any similar agency of a
8 foreign government) to assist a patent applicant in complying with its duty of candor. Nothing in
9 this provision shall prohibit any attorney of record in this litigation from discussing any aspect of
10 this case that is reasonably necessary for the prosecution or defense of any claim or counterclaim
11 in this litigation with his/her client.

12 **IV. ACQUISITION BAR**

13 A. Any person reviewing any of an opposing party's Protected Information shall not,
14 for a period commencing upon receipt of such information and ending three years following the
15 conclusion of this case (including any appeals) engage in any Acquisition Activity (as defined
16 below) on behalf of a party asserting a patent in this case.

17 B. Acquisition Activity shall mean any activity related to: (i) the acquisition of
18 patents or patent applications (for any person or entity) relating to the technology at issue; or (ii)
19 advising or counseling clients regarding the same.

20 **V. TECHNICAL ADVISORS**

21 **A. Purpose**

22 Protected Information designated by the producing party and such copies of Protected
23 Information as are reasonably necessary for maintaining, defending, or evaluating this litigation
24 may be furnished and disclosed to the receiving party's Technical Advisors and their necessary
25 support personnel, who are based in the United States.

26 **B. No Disclosure Without Protective Order Subscription**

27 No disclosure of Protected Information to a Technical Advisor or their necessary support
28 personnel shall occur unless the person is located in the United States, agrees not to transmit the

1 information outside of the United States and until that person has signed the Confidentiality
2 Agreement attached hereto as Attachment A, and a signed copy has been provided to the
3 producing party; and to the extent there has been an objection under section V.D, that objection is
4 resolved according to the procedures set forth below.

5 **C. Prior Notice of Intent to Disclose Protected Information to a Technical**
6 **Advisor**

7 A party desiring to disclose Protected Information to a Technical Advisor also shall give
8 prior written notice of the intended disclosure by email to all counsel of record in the litigation
9 and the producing party shall have ten (10) business days after such notice is given to object in
10 writing to the disclosure. The party desiring to disclose Protected Information to a Technical
11 Advisor must provide the following information for each Technical Advisor: name, address,
12 curriculum vitae, current employer, employment history for the past ten (10) years, and a listing
13 of cases in which the witness has testified as an expert at trial or by deposition within the
14 preceding four (4) years, and an identification of any patents or patent applications in which the
15 Technical Advisor is identified as an inventor or applicant, is involved in prosecuting or
16 maintaining, or has any pecuniary interest]. No Protected Information shall be disclosed to such
17 Technical Advisor(s) until after the expiration of the foregoing notice period and resolution of
18 any objection.

19 **D. Objections to Technical Advisors**

20 A party objecting to disclosure of Protected Information to a Technical Advisor shall state
21 with particularity the ground(s) of the objection. The objecting party's consent to the disclosure
22 of Protected Information to a Technical Advisor shall not be unreasonably withheld, and its
23 objection must be based on that party's good faith belief that disclosure of its Protected
24 Information to the Technical Advisor will result in specific business or economic harm to that
25 party.

26 **E. Resolution of Objections to Technical Advisors**

27 If after consideration of the objection, the party desiring to disclose the Protected
28 Information to a Technical Advisor refuses to withdraw the Technical Advisor, that party shall

1 provide notice to the objecting party. Thereafter, the objecting party shall move the Court, within
2 ten (10) business days of receiving such notice, for a ruling on its objection. A failure to file a
3 motion within the ten (10) business day period, absent an agreement of the parties to the contrary
4 or for an extension of such ten (10) business day period, shall operate as an approval of disclosure
5 of the Protected Information to the Technical Advisor. The parties agree to cooperate in good
6 faith to shorten the timeframes set forth in this paragraph if necessary to abide by any discovery
7 or briefing schedules.

8 **F. Burden for Objections to Technical Advisors**

9 1. The objecting party shall have the burden of showing to the Court “good cause”
10 for preventing the disclosure of its Protected Information to the Technical Advisor. For purposes
11 of this paragraph, “good cause” includes, but is not limited to, a particularized showing that: (i)
12 the Protected Information is confidential commercial information, (ii) disclosure of the Protected
13 Information is likely to harm the objecting party’s business, (iii) the challenged Technical
14 Advisor currently has, previously had, or is reasonably likely in the future to develop, a
15 relationship with a competitor of the producing party that would create a reasonable risk of
16 disclosure, whether intentional or not, of the Protected Information or any part of it to that
17 competitor, or (iv) the Technical Advisor’s access to the Protected Information may create other
18 confidentiality or legal risks in connection with other patent-related activities or interests tied to
19 the Technical Advisor.

20 2. A party who has not previously objected to disclosure of Protected
21 Information to a Technical Advisor or whose objection has been resolved with respect to
22 previously produced Protected Information shall not be precluded from raising an objection to a
23 Technical Advisor at a later time with respect to Protected Information that is produced after the
24 time for objecting to such a Technical Advisor has expired. Any such objection shall be handled
25 in accordance with the provisions set forth above.

26 **VI. CHALLENGES TO CONFIDENTIALITY DESIGNATIONS**

27 **A. Use of Reasonable Care and No Waiver**

28 The parties shall use reasonable care when designating Protected Information. Nothing in

1 this Order shall prevent a receiving party from contending that any Protected Information has
2 been improperly designated. A receiving party may at any time request that the producing party
3 cancel or modify the Protected Information designation with respect to any document or any
4 information contained therein.

5 **B. Objections to Confidentiality Designations**

6 A party shall not be obligated to challenge the propriety of a designation of any category
7 of Protected Information at the time of production, and a failure to do so shall not preclude a
8 subsequent challenge thereto. In the event that a party objects to the designation of Protected
9 Information, such a challenge shall be in writing, shall be served on counsel for the producing
10 party, and shall particularly identify the Protected Information that the receiving party contends
11 should be differently designated. The parties shall use their best efforts to resolve promptly and
12 informally such disputes and shall advise one another of both the factual and legal basis for their
13 respective positions. If an agreement cannot be reached, the receiving party shall request that the
14 Court cancel or modify a designation. The burden of demonstrating the confidential nature of
15 Protected Information shall at all times be and remain on the designating party.

16 **C. Treatment of Protected Information During Challenge to a**
17 **Designation**

18 Unless otherwise resolved by agreement between the parties, until a determination by the
19 Court, the Protected Information at issue shall be treated as having been properly designated and
20 subject to the terms of this Order.

21 **VII. LIMITATIONS ON THE USE OF PROTECTED INFORMATION**

22 **A. Restrictions on Use of Protected Information**

23 All Protected Information shall be held in confidence by each person to whom it is
24 disclosed, and such Protected Information (including the existence of such Protected Information)
25 and the knowledge of the existence of such Protected Information shall be used only for purposes
26 of this litigation, shall not be used for any business purpose or in connection with any other legal
27 or administrative proceeding, including but not limited to any proceeding at the U.S. Patent and
28 Trademark Office (or any similar agency of a foreign government), and shall not be disclosed to

1 any person who is not entitled to receive such Protected Information as herein provided. All
2 produced Protected Information shall be carefully maintained so as to preclude access by persons
3 who are not entitled to receive such Protected Information.

4 **B. Examinations and Court Filings Concerning Protected Information**

5 Except as may be otherwise ordered by the Court, any person may be examined as a
6 witness at depositions and trial and may testify concerning all Protected Information of which
7 such person has prior personal knowledge. Without in any way limiting the generality of the
8 foregoing:

9 1. A present director, officer, and/or employee of a producing party may be examined
10 and may testify concerning all Protected Information which has been produced by that party;

11 2. A former director, officer, agent and/or employee of a producing party may be
12 interviewed, examined and may testify concerning all Protected Information of which he or she
13 has personal knowledge, including any Protected Information that refers to matters of which the
14 witness has personal knowledge, which has been produced by that party and which pertains to the
15 period or periods of his or her employment; and

16 3. Non-parties may be examined or testify concerning any Protected Information of a
17 producing party, which appears on its face or from other documents or testimony to have been
18 received from or communicated to the non-party as a result of any contact or relationship with the
19 producing party or a representative of the producing party. Any person other than the witness, his
20 or her attorney(s), or any person qualified to receive Protected Information under this Order shall
21 be excluded from the portion of the examination concerning such Protected Information, unless
22 the producing party consents to persons other than qualified recipients being present at the
23 examination. If the witness is represented by an attorney who is not qualified under this Order to
24 receive such Protected Information, then prior to the examination, the attorney must provide a
25 signed agreement, in the form of Attachment A hereto, that he or she will comply with the terms
26 of this Order and maintain the confidentiality of Protected Information disclosed during the
27 course of the examination. In the event that such attorney declines to sign such a statement prior
28 to the examination, the parties, by their attorneys, shall jointly seek a protective order from the

1 Court prohibiting the attorney from disclosing Protected Information.

2 4. Every fact witness shall be informed at the start of a deposition that he or she may
3 be shown documents designated as Protected Information in this litigation, and that such
4 Protected Information and the contents therein are being furnished to the witness solely for use in
5 this litigation. Every fact witness shall be shown a copy of this Order. No fact witness may
6 retain any material designated as Protected Information.

7 5. All transcripts of depositions, exhibits, answers to interrogatories, pleadings,
8 briefs, and other documents submitted to the Court that have been designated as Protected
9 Information, or which contain information so designated, shall be filed under seal in a manner
10 prescribed by the Court for such filings unless the Court orders otherwise. To avoid unnecessary
11 sealing of Court records and motion practice relating to sealed filings, any party preparing a filing
12 with the Court that may contain Protected Information may identify to the producing party or
13 non-party the specific Protected Information at issue and request a waiver of the confidentiality
14 protections for that specific Protected Information. Upon receipt of such a request to waive
15 confidentiality protections, the producing party or non-party shall respond in good faith within
16 two (2) business days.

17 6. Outside litigation attorneys of record for the parties are hereby authorized to be the
18 persons who may retrieve confidential exhibits and/or other confidential matters filed with the
19 Court upon termination of this litigation without further order of this Court, and are the persons to
20 whom such confidential exhibits or other confidential matters may be returned by the Clerk of the
21 Court, if they are not so retrieved. No material or copies thereof so filed shall be released, except
22 by order of the Court, to outside litigation counsel of record, or as otherwise provided for
23 hereunder. Notwithstanding the foregoing and with regard to material designated as
24 RESTRICTED CONFIDENTIAL - SOURCE CODE, the provisions of section I(D) are
25 controlling to the extent those provisions differ from this paragraph.

26 7. Protected Information shall not be copied or otherwise produced by a receiving
27 party, except for transmission to qualified recipients, without the written permission of the
28 producing party, or, in the alternative, by further order of the Court. Nothing herein shall,

1 however, restrict a qualified recipient from making working copies, abstracts, digests and
2 analyses of Protected Information for use in connection with this litigation, and such working
3 copies, abstracts, digests and analyses also shall be deemed Protected Information under the terms
4 of this Order. Further, nothing herein shall restrict a qualified recipient from converting or
5 translating Protected Information into machine-readable form for incorporation into a data
6 retrieval system used in connection with this action, provided that access to that Protected
7 Information, in whatever form stored or reproduced, shall be limited to qualified recipients.

8 8. Testimony given at deposition may be designated as Protected Information by
9 outside litigation counsel of record by making a statement orally to that effect on the record at any
10 time during the deposition. Within fifteen (15) business days of receipt of the final certified
11 transcript of any deposition, the producing party may request that the original and all copies of the
12 deposition transcript, in whole or in part, be marked with an appropriate confidentiality
13 designation. Confidentiality designations shall be made by notifying all parties in writing of the
14 specific pages and lines of the transcript that should be treated as Protected Information.
15 Deposition transcripts shall be treated by default as HIGHLY CONFIDENTIAL – OUTSIDE
16 COUNSEL ONLY until the expiration of the time to make a confidentiality designation unless
17 otherwise agreed to by the parties. Any portions so designated shall thereafter be treated in
18 accordance with the terms of this Order. Objections to confidentiality designations under this
19 paragraph shall be governed by the procedure set forth in section VI above.

20 C. Export Control

21 Each party receiving Protected Information shall comply with all applicable export control
22 statutes and regulations. See, e.g., 15 CFR 734.2(b). No Protected Information may leave the
23 territorial boundaries of the United States of America or be made available to any foreign national
24 who is not (i) lawfully admitted for permanent residence in the United States or (ii) identified as a
25 protected individual under the Immigration and Naturalization Act (8 U.S.C. 1324b(a)(3)).
26 Without limitation, this prohibition extends to Protected Information (including copies) in
27 physical and electronic form. The viewing of Protected Information through electronic means
28 outside the territorial limits of the United States of America is similarly prohibited.

1 Notwithstanding this prohibition, Protected Information, exclusive of material designated
2 RESTRICTED CONFIDENTIAL - SOURCE CODE, and to the extent otherwise permitted by
3 law, may be taken outside the territorial limits of the United States if it is reasonably necessary
4 for a deposition taken in a foreign country. The restrictions contained within this paragraph may
5 be amended through the consent of the producing party to the extent that such agreed to
6 procedures conform with applicable export control laws and regulations.

7 **D. Unauthorized Disclosure of Protected Information**

8 If a receiving party learns that, by inadvertence or otherwise, it has disclosed Protected
9 Information to any person or in any circumstance not authorized under this Order, the receiving
10 party must immediately: (i) notify in writing the producing party of the unauthorized
11 disclosure(s); (ii) use its best efforts to retrieve all copies of the Protected Information; (c) inform
12 the person or persons to whom unauthorized disclosures were made of all the terms of this Order;
13 and (d) request that such person or persons execute the Confidentiality Agreement attached hereto
14 as Attachment A. Compliance with this paragraph upon the discovery of an unauthorized
15 disclosure of Protected Information is mandatory and shall not excuse a violation of this Order or
16 exempt a violating party from sanctions pursuant to paragraph E below.

17 **E. Violations**

18 If any party violates the limitations on the use of Protected Information as described
19 above, the party violating this Order shall be subject to sanctions as ordered by the Court. In the
20 event motion practice is required to enforce the terms of this Order, the prevailing party on such a
21 motion shall be awarded costs, expenses, and fees, including attorney or other professional fees,
22 incurred in connection with the discovery of the violation and the preparation, filing, and arguing
23 of the motion or any other proceedings resulting from the violation.

24 **VIII. NON-PARTY USE OF THIS PROTECTIVE ORDER**

25 **A. Purpose**

26 A non-party producing Discovery Material voluntarily or pursuant to a subpoena or a
27 court order may designate such Discovery Material as Protected Information pursuant to the terms
28 of this Protective Order.

1 **B. Non-Party Access**

2 A non-party's use of this Protective Order to protect its Protected Information does not
3 entitle that non-party access to the Protected Information produced by any party or non-party in
4 this case.

5 **IX. NO WAIVER OF PRIVILEGE**

6 Nothing in this Protective Order shall require production of information that a party
7 contends is protected from disclosure by the attorney-client privilege, the work product privilege,
8 the common interest privilege, or any other privilege, doctrine, right, or immunity. Disclosures
9 among defendants' attorneys of work product or other communications relating to issues of
10 common interest shall not affect or be deemed a waiver of any applicable privilege or protection
11 from disclosure. Pursuant to Fed. R. Evid. 502(d), the production of a privileged or work-
12 product-protected document is not a waiver of privilege or protection from discovery in this case
13 or in any other federal or state proceeding. For example, the mere production of privileged or
14 work-product-protected documents in this case as part of a mass production is not itself a waiver
15 in this case or any other federal or state proceeding. A producing party may assert privilege or
16 protection over produced documents at any time by notifying the receiving party in writing of the
17 assertion of privilege or protection. In addition, information that contains privileged matter or
18 attorney work product shall be immediately returned if such information appears on its face to
19 have been inadvertently produced.

20 **X. MISCELLANEOUS PROVISIONS**

21 **A. Waiver**

22 Any of the notice requirements herein may be waived, in whole or in part, but only in
23 writing signed by the attorney-in-charge for the party against whom such waiver will be effective.

24 **B. Inadvertent or Unintentional Production of Protected Information**

25 Inadvertent or unintentional production of documents or things containing Protected
26 Information which are not designated as one or more categories of Protected Information at the
27 time of production shall not be deemed a waiver in whole or in part of a claim for confidential
28 treatment. With respect to documents, the producing party shall immediately upon discovery

1 notify the other parties of the error in writing and provide replacement pages bearing the
2 appropriate confidentiality legend. In the event of any disclosure of Protected Information other
3 than in a manner authorized by this Protective Order, including any unintentional or inadvertent
4 disclosure, counsel for the party responsible for the disclosure shall immediately notify opposing
5 counsel of all of the pertinent facts, and make every effort to further prevent unauthorized
6 disclosure including, retrieving all copies of the Protected Information from the recipient(s)
7 thereof, and securing the agreement of the recipients not to further disseminate the Protected
8 Information in any form. Compliance with the foregoing shall not prevent the producing party
9 from seeking further relief from the Court.

10 **C. Testifying Experts**

11 Testifying experts shall not be subject to discovery of any draft of their reports in this
12 case, and such draft reports, notes, outlines, or any other writings leading up to an issued report(s)
13 in this litigation are exempt from discovery. In addition, all communications between counsel for
14 a party and that party's testifying expert, and all materials generated by a testifying expert with
15 respect to that person's work, are exempt from discovery unless they relate to the testifying
16 expert's compensation or identify facts, data or assumptions relied upon by the testifying expert
17 in forming any opinions in this litigation and such information is not already disclosed in the
18 testifying expert's report.

19 **D. Conclusion of Litigation**

20 Within sixty (60) business days after the entry of a final non-appealable judgment or
21 order, or the expiration of the deadline for any party to appeal any final judgment or order, or the
22 complete settlement of all claims asserted against all parties in this action, each party shall, at the
23 option of the producing party, either return or destroy all physical objects and documents which
24 embody Protected Information it has received, and shall destroy in whatever form stored or
25 reproduced, all physical objects and documents, including but not limited to, email,
26 correspondence, memoranda, notes and other work product materials, which contain or refer to
27 any category of Protected Information. All Protected Information not embodied in physical
28 objects and documents shall remain subject to this Order.

1 In the event that a party is dismissed before the entry of a final non-appealable judgment
2 or order, this same procedure shall apply to any Protected Information received from or produced
3 to the dismissed party.

4 Notwithstanding this provision, outside litigation counsel of record are not required to
5 delete Protected Information that may reside on their respective firm's electronic back-up systems
6 that are over-written in the normal course of business. Notwithstanding the foregoing, outside
7 litigation counsel of record shall be entitled to maintain an electronic copy of all pleadings,
8 motions and trial briefs (including all supporting and opposing papers and exhibits thereto),
9 written discovery requests and responses, deposition transcripts (and exhibits thereto), trial
10 transcripts, and exhibits offered or introduced into evidence at any hearing or trial, and their
11 attorney work product, which refers or is related to any Protected Information for archival
12 purposes only.

13 If the producing party requests that Protected Information be destroyed, the receiving
14 party must provide a certificate of destruction to the producing party.

15 **E. Subpoenas**

16 If at any time documents containing Protected Information are subpoenaed by any court,
17 arbitral, administrative or legislative body, or are otherwise requested in discovery, the person to
18 whom the subpoena or other request is directed shall immediately give written notice thereof to
19 every party or non-party who has produced such documents and to its counsel, and shall provide
20 each such party with an opportunity to object to the production of such documents. If a
21 producing party does not take steps to prevent disclosure of such documents within ten (10)
22 business days of the date written notice is given, the party to whom the referenced subpoena is
23 directed may produce such documents in response thereto, but shall take all reasonable measures
24 to have such documents treated in accordance with terms of this Protective Order.

25 **F. Post-Filing Communications**

26 No party shall be required to identify on their respective privilege log any document or
27 communication dated on or after the filing of the lawsuit, which absent this provision, the party
28 would have been obligated to so identify on said privilege log. The parties shall exchange their

1 respective privilege document logs at a time to be agreed upon by the parties following the
2 production of documents.

3 **G. Modification of Protections**

4 This Order is entered without prejudice to the right of any party, either by agreement with
5 other parties to this action, or by applying to the Court if agreement cannot be reached among
6 parties, to extend additional protection, or to reduce or rescind the restrictions of this Order, when
7 convenience or necessity requires. Furthermore, without application to the Court, any party that
8 is a beneficiary of the protections of this Order may enter a written agreement releasing any other
9 party hereto from one or more requirements of this Order even if the conduct subject to the
10 release would otherwise violate the terms herein.

11 **H. No Agreement Concerning Discoverability**

12 The identification or agreed upon treatment of certain types of Discovery Material does
13 not reflect agreement by the parties that the disclosure of such categories of Discovery Material is
14 required or appropriate in this action. The parties reserve the right to argue that any particular
15 category of Discovery Material should not be produced.

16 **I. No Limitation on Legal Representation**

17 Nothing in this Protective Order shall preclude or impede outside litigation counsel of
18 record's ability to communicate with or advise their client in connection with this litigation based
19 on such counsel's review and evaluation of Protected Information, provided however, that such
20 communications or advice shall not disclose or reveal the substance or content of any Protected
21 Information other than as permitted under this Protective Order.

22 **J. Agreement Upon Execution**

23 Each of the parties agrees to be bound by the terms of this Protective Order as of the date
24 counsel for such party executes this Protective Order, even if prior to entry of this order by the
25 Court.

26 **K. Interpretation, Enforcement and Continuing Jurisdiction**

27 The United States District Court for the District of Nevada is responsible for the
28 interpretation and enforcement of this Protective Order. After termination of this litigation, the

provisions of this Protective Order shall continue to be binding except with respect to that Discovery Material that become a matter of public record. This Court retains and shall have continuing jurisdiction over the parties and recipients of the Protected Information for enforcement of the provision of this Protective Order following termination of this litigation. All disputes concerning Protected Information produced under the protection of this Protective Order shall be resolved by the United States District Court for the District of Nevada.

IT IS SO STIPULATED.

DATED: April 25, 2016

DATED: April 25, 2016

/s/ Robert J. Cassity
Robert J. Cassity
Holland & Hart Llp
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134

Dylan J. Liddiard
Anthony J Weibell
Wilson Sonsini Goodrich & Rosati
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Attorneys for Plaintiffs

/s/ Mark R. Smith
Mark R. Smith
Law Offices of Mark R. Smith, P.C.
8565 S. Eastern Avenue, Suite 150
Las Vegas, NV 89123

Attorney for Defendant

IT IS SO ORDERED:


GEORGE FOLEY JR.
United States Magistrate Judge

Dated: May 4, 2016

ATTACHMENT A
CONFIDENTIALITY AGREEMENT

My name is _____.

I reside at _____.

My present employer is _____.

My present occupation or job description is _____.

I have been engaged as _____

on behalf of _____ in the preparation and conduct of
litigation styled *Salebuild, Inc., et al. v. Flexisales, Inc.*, Case No. 2:12-cv-1403-JAD-GWF.

I have received a copy of, read, and understand the Agreed Protective Order for the
Treatment of Confidential Information. I agree to comply with and be bound by all its provisions.
I will retain all copies of any documents designated as Protected Information, or any similar
designation, in a secure manner and in accordance with the terms of said Order, and that all
copies are to remain in my personal custody until I have completed my assigned duties,
whereupon the copies and any writings prepared by me containing any information containing
any Protected Information are to be returned to counsel who provided me with such material.

I will not divulge Protected Information to persons other than those specifically authorized
by said Order, I will not transmit or take Protected Information outside of the U.S., and I will not
copy or use, except solely for the purpose of this action, any Protected Information obtained
pursuant to said Order, except as provided in said Order. I also agree to notify any stenographic
or clerical personnel who are required to assist me of the terms of said Order.

In accordance with paragraph V.C. of the Order (if applicable), I have attached to this
Confidentiality Agreement my curriculum vitae and any other required information.

I state under penalty of perjury under the laws of the United States of America that the
foregoing is true and correct.

Signed: _____

Dated: _____